UNITED STATES
v.
MICHAEL KURETICH ET AL.

IBLA 79-582 Decided April 17, 1981

Appeal from decision of Administrative Law Judge Robert W. Mesch declaring the Lucky Strike lode mining claim and Ten Spot millsite claim null and void. Contest CA 4994.

Affirmed.

1. Mining Claims: Generally--Mining Claims: Determination of Validity--Mining Claims: Discovery--Mining Claims: Lode Claims

   No discovery of a valuable mineral deposit is demonstrated where the amounts of mineral yielded by a claim are so small that mining could not be expected to produce an economic return in any way commensurate with the labor and cost involved in extracting, transporting, and processing the mineralization.

2. Mining Claims: Contests--Mining Claims: Determination of Validity--Mining Claims: Discovery--Mining Claims: Lode Claims

   Where the land on which a mining claim is located is subsequently closed to mineral entry, the validity of the claim must be determined as of the date of the withdrawal, as well as of the date of the hearing. If there was no discovery as of the date of withdrawal, the land would not be excepted from the effect of the withdrawal and the claim could not thereafter become valid even though there might be a discovery at a later date.

3. Mining Claims: Discovery: Generally

A Government mineral examiner is under no duty to undertake discovery work or to explore beyond the current workings of a claim.

4. Mining Claims: Discovery: Generally

Evidence of mineralization which may justify further exploration, but not development of actual mining operations, is not sufficient to establish that a discovery of a valuable mineral deposit has been made.

5. Mining Claims: Discovery: Generally

The prudent man rule, rather than the comparative value rule, is the proper test for determining the existence of a discovery of a valuable mineral deposit under the general mining law.

6. Millsites: Dependent--Mining Claims: Millsites

Where a dependent millsite is allegedly operated only in connection with a lode mining claim which is invalid, it necessarily follows that the millsite is invalid.

7. Administrative Procedure: Hearings--Rules of Practice: Hearings

A second hearing will not be afforded where a mining claimant has been given notice and an opportunity to appear at a hearing and where nothing has been submitted to indicate that another hearing would produce a different result.

APPEARANCES: Phillip D. Reed, Esq., Lake Elsinore, California, for appellant; John McMunn, Esq., Office of the Regional Solicitor, for the appellee.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

Michael Kuretich appeals 1/ the decision of Administrative Law Judge Robert W. Mesch, dated August 2, 1979, holding the Lucky Strike lode and Ten Spot millsite claims null and void. Appellant's claims are located in the Death Valley Monument, Inyo County, California, 2/ which was closed to mineral entry by the Act of September 28, 1976, 90 Stat. 1342, 16 U.S.C. §§ 1901-1912 (1976). The contest, CA 4994, was initiated by the California State Office, Bureau of Land Management (BLM), at the request of, and on behalf of, the National Park Service (NPS). The hearing was held on May 1, 1979, in Lawndale, California.

With respect to the Lucky Strike lode claim, the Government charged that there was not presently disclosed within the boundaries of the claim minerals of a variety subject to the mining laws, sufficient in quantity, quality, and value to constitute a discovery. As to the Ten Spot millsite, the Government alleged that the land was not being used or occupied for mining or milling purposes.

[1] As noted in the Administrative Law Judge's decision, the location of a mining claim does not create any rights against the United States unless and until all the requirements of the mining law have been fulfilled. United States v. Coleman, 390 U.S. 599 (1968); Foster v. Seaton, 271 F.2d 836 (D.C. Cir. 1959). The validity of a mining claim is determined by whether there has been a discovery of a valuable mineral deposit within the limits of that claim. In the case of a lode mining claim, there must be exposed within the claim a vein or lode bearing mineral of such quality and quantity as would induce a prudent person to expend time and means with the expectation of developing a valuable or paying mine. United States v. Netherlin, 33 IBLA 86 (1977); United States v. Rukke, 32 IBLA 155 (1977). Further, no discovery of a valuable mineral deposit is demonstrated where the amounts of mineral yielded by a claim are so small that mining could not be expected to produce an economic return in any way commensurate with the labor and cost involved in extracting, transporting, and processing the mineralization. United States v. Kiggins, 39 IBLA 88 (1979). Nor is it enough that a claimant is willing to accept a meager income from the claim. United States v. Reynders, 26 IBLA 131 (1976); United States v. Arcand, 23 IBLA 226 (1976); United States v. Heard, 18 IBLA 43 (1974).

1/ In addition to appellant, Fred Kuretich, Thomas Kuretich, and Steve Penner were named in the contest complaint as contestees. Appellant was the only contestee to appear at the hearing and is the only contestee to have filed an appeal. The decision as to the other contestees is final.
2/ The claims are situated in SE 1/4 sec. 23 and SW 1/4 sec. 24, respectively, protracted T. 23 S., R. 45 E., Mount Diablo meridian.

[2] Where, as in this case, the land on which the mining claim is located is subsequently closed to mineral entry, the validity of the claim must be established as of the date of the withdrawal, as well as of the date of the hearing. United States v. Porter, 37 IBLA 313, 315 (1978); United States v. Netherlin, supra. If there was no discovery on the date of closure, the land would not be excepted from the effect of the withdrawal and the claim could not thereafter become valid even though there might be discovery at a later date. United States v. Chappell, 42 IBLA 74, 78 (1979).

A millsite claim cannot be recognized as valid unless (a) it is used and occupied by the proprietor of a lode or placer mining claim for mining, milling, or related purposes in connection with a specific lode or placer mining claim with which the millsite is associated, or (b) there is an operable quartz mill or reduction works on the land that provides an essential and needed milling operation. In the latter instance, the owner of a quartz mill or reduction works need not be the owner or proprietor of an associated mine. 30 U.S.C. § 42 (1976); United States v. Paden, 44 IBLA 253 (1979); United States v. Cuneo, 15 IBLA 304, 81 I.D. 262 (1974).

With respect to the lode mining claim, on appeal appellant asserts that the Government failed to establish a prima facie case. We must disagree. Judge Mesch properly found that the Government had presented a prima facie case of lack of a discovery of a valuable mineral deposit on the Lucky Strike lode claim. He summarized the evidence in support of that finding as follows (Decision at 3-4):

> The Lucky Strike lode claim was located in 1931. The present claimants obtained title to the claim in 1973. The workings on the claim consist of a shaft, which is about 6 feet by 6 feet at the collar and some 10 or 12 feet deep, and four or five small pits varying in depth up to about 4 feet. A witness testified that the workings "wouldn't amount to much more than the assessment work for one year." (Tr. 35.) No mineralization has been produced and sold from the claim. These facts raise a presumption that a valuable mineral deposit has not been found within the claim. United States v. Zweifel, 508 F.2d 1150 (10th Cir. 1975).
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> A mining engineer employed by the National Park Service, who has extensive experience with private industry and various Government agencies, testified that he visited the mining claim more than a dozen times between 1973 and the time of the hearing; that on three of his trips to the claim he was accompanied by one or more of the mining claimants; and that he took samples at locations identified by the mining claimants and had the samples assayed for mineral values specified by the claimants. He expressed the opinion, based upon his examination of the claim, the assay results obtained from his samples, a study of the geology

> of the area, and a consideration of the past mining history of the area, that a prudent person would not be justified in the expenditure of his labor and means upon the claim with a reasonable prospect of success in developing a valuable mine. He testified that, assuming there was a minable quantity of mineralization on the claim, which he felt was a very questionable assumption, the mining costs alone as of 1976 and the present time would exceed the value of the mineralization by approximately $ 60.00 per ton.

Appellant contends that the Government failed to establish insufficient quality and quantity of material on the Lucky Strike claim. He urges that in that connection "no evidence, not one single study, survey, report, or even core drilling examination was performed by contestant nor introduced into evidence to show how much Silver was estimated to be within the boundaries of the Lucky Strike claim" (Statement of Reasons at 7).

[3] Appellant misperceives the obligation of the Government in examining an unpatented mining claim. The Board has held many times that a Government mineral examiner is under no duty to undertake discovery work or to explore beyond the current workings of a claim. United States v. Porter, supra at 315; United States v. Dietemann, 26 IBLA 356 (1976). The Government mineral examiner in this case took samples at locations pointed out to him by contestees (Tr. 5, 8-9). Based on assays of those samples, the mineral examiner concluded:

> [T]his is very questionable, especially the values dropping off on that LS W-4 sample to one ounce per ton, there is no indication that it goes to depth. In other words, assuming a mining cost, assuming that it did go to depth, but -- and then of course, there certainly is nothing laterally that is, along the strike of the vein -- well, I didn't sample in the pits to determine that, admittedly, but certainly Mr. Kuretich gave me no indication of any appreciable value in those pits, and then in the other direction, that is, eastward, toward sample LS-QZ, we are faced, you see, with virtually no silver. There is nothing to indicate anything whatsoever on strike or down dip, or that is, whether there would be any continuity from the shaft of the vein.
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> Q How do you arrive at this interpretation?
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> A Well, by the virtual lack of mineral on -- as I said, on strike, in sample number L.S. QZ, and then the fact that no one indicate [sic] to me, at least, there was any values in the pits, that is, on strike, and then of course the -- as I said, the sample L.S. W-4, being only one ounce of silver per ton certainly would be discouraging that it

> would go down dip. In other words, that is your two dimensions, along the strike of the vein or the trend of the vein, and then down the dip of the vein, which dips around 65 degrees, approximately.
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> Q Do you believe that the results that you obtained on your sampling at the discovery points pointed out to you by the Kuretiches as their best locations on the claim indicate the presence of any commercial mineral values on the Lucky Strike?
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> A They do not indicate the presence of any commercial mineral values on the Lucky Strike claim.
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> Q Why not?
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> A Because they are too low.

(Tr. 72-73).

Appellant urges that he has no burden of proof until a prima facie case is shown. We agree; however, in this case the prima facie case of lack of discovery was clearly established, and the ultimate burden of establishing a discovery of a valuable mineral deposit rested with the mining claimant. Hallenbeck v. Kleppe, 590 F.2d 852, 856 (10th Cir. 1979); United States v. Zweifel, 508 F.2d 1150, 1157 (10th Cir. 1975), cert. denied, 423 U.S. 829 (1976); Foster v. Seaton, 271 F.2d 836 (D.C. Cir. 1959).

[4] Appellant's evidence fell woefully short of showing a discovery on the Lucky Strike claim. As stated by Judge Mesch (Decision at 5):

> The mining claimants did not present any evidence from which any conclusions might be drawn as to (1) the amount of mineralization that might be available for extraction, (2) the value of the mineralization that might be extracted, or (3) the costs of extracting and marketing the mineralization. Without some information relating to each of these three factors, no one could conclude that a mineral deposit has been found with a present value for mining purposes. Accordingly, it must be concluded that the claimants did not meet their burden of proof by showing that a valuable mineral deposit has been found within the contested mining claim.
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> At best, the evidence presented by the mining claimants simply shows that the property might warrant the expenditure of some prospecting or exploration time and money in an effort to ascertain whether a valuable mineral deposit might be found. It does not show that a valuable mineral deposit has been found.

Clearly, evidence of mineralization which may justify further exploration, but not development of actual mining operations, is not sufficient to establish that a discovery of a valuable mineral deposit has been made. United States v. Ax, 43 IBLA 146 (1979); United States v. Russell, 40 IBLA 309 (1979); United States v. Dillman, 36 IBLA 358 (1978).

[5] Appellant believed that Judge Mesch applied the "wrong test" in determining no discovery on the Lucky Strike claim. Appellant states that "[w]here the contestant United States prevents mining activity of an existing discovery, the 'Comparative Value Rule' rather than the 'Prudent Man Rule' should be the test of claim validity" (Statement of Reasons at 9).

Appellant cites Filcher v. United States, 7 F.2d 519 (9th Cir. 1925), for the proposition that "the land must be found to be more valuable for recreational uses than for mineral or mining uses * * * to invalidate a mineral entry" (Statement of Reasons at 10). We note that Filcher is totally inapposite in that it involved the challenge to a classification of railroad grant lands concerning their mineral or nonmineral character. In addition, as we observed in United States v. Kosanke Sand Corp. (On Reconsideration), 12 IBLA 282, 299, 80 I.D. 538, 547 (1973), early Departmental decisions applying the mining laws often involved competing agricultural and mineral claimants. Those cases reflected a comparison of values approach; however, the Department expressly held in Cataract Gold Mining Co., 43 I.D. 248, 254 (1914):

> [I]f a mineral claimant is able to show that the land contains mineral of such quantity and value as to warrant a prudent man in the expenditure of his time and money thereupon in the reasonable expectation of success in developing a paying mine, such lands are disposable only under the mineral laws, notwithstanding the fact that they may possess a possible or probable greater value for agriculture or other purposes.

Therefore, the prudent man rule, not the comparative value rule, is the appropriate test for determining the existence of a discovery of a valuable mineral deposit under the general mining law. See United States v. Kosanke Sand Corp. (On Reconsideration), supra at 302, 80 I.D. at 548.

Appellant further alleges that he was denied due process because the Government denied him the right to secure samples and evidence to prove a discovery of the Lucky Strike claim. 3/ This same argument

3/ Surface disturbance was prohibited by section 4 of the Act of September 28, 1976, 16 U.S.C. § 1903 (1976), which provided in pertinent part:

"For a period of four years after the date of enactment of this Act, holders of valid mineral rights located within the boundaries of

was made in a posthearing brief and was properly disposed of by Judge Mesch in his decision. In finding no merit in the argument he stated (Decision at 9):

> If the contestees had found a valuable mineral deposit prior to the withdrawal they should have been able to present some evidence establishing that fact. If, for some reason, such evidence was not available they could at least have submitted a request for an appropriate order and offered some explanation as to why the evidence was not available, what the evidence would show and how the evidence might be obtained. If a valuable mineral deposit had not been found, i.e., a deposit of sufficient quality and quantity to justify, as of September 28, 1976, the expenditure of time and money in actually mining the property, it would serve no useful purpose after the withdrawal to permit Mr. Kuretich to satisfy his desire "to drop a shaft on the Lucky Strike to see if there is anything really down below the surface farther than what it is." (Tr. 157).

Appellant also argues that the contest was "untimely." He asserts that it is "fundamentally untimely and unfair to bring a contest at a time when the mine cannot be activated without incurring threat of arrest, or, at a time when Silver prices are at a historical low, or mining costs historically high." He states further that the Government "may contest a claim for lack of discovery at anytime, but in the present case, the real reason for the contest is merely lack of development, and in that respect the contest is again untimely" (Emphasis added; Statement of Reasons at 17).

Appellant's contention is erroneous. There can be no such thing as an untimely contest. In essence appellant is complaining because he was required to comply with the requirements of the mining law. As correctly pointed out by Judge Mesch, inaction by the Government merely afforded appellant the opportunity to perfect the discovery prior to the withdrawal.

Finally, with respect to the Ten Spot millsite claim appellant argues that its validity is tied to the Lucky Strike claim as a matter of law and that the evidence clearly supports "the view that the mill

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fn. 3 (continued)
Death Valley National Monument * * * shall not disturb for purposes of mineral exploration or development the surface of any lands which had not been significantly disturbed for purposes of mineral extraction prior to February 29, 1976." (Emphasis added.)
The only exception stated in the Act is for enlargement of an excavation "necessary in order to make feasible continued production therefrom." Appellant cannot avail himself of this exception for obvious reasons.

site was used in conjunction with mining activity in general and the use of the Lucky Strike in particular" (Statement of Reasons at 15).

In finding that the Government had presented a prima facie case in support of the allegation that the millsite claim was invalid because it was not being used for milling or milling purposes, Judge Mesch summarized the Government's evidence as follows (Decision at 6):

> The mill site claim is situated about a mile to the south and west of the contested lode claim. There are several dilapidated but habitable and usable buildings on the claim. The area of the buildings is commonly referred to as "Russell's Camp". A man named Russell owned the claim prior to its conveyance to the present claimants in 1973. In the past, "Russell's Camp" was used by various miners or prospectors to store equipment, stockpile mineralized material and process mineralized material. In processing mineralized material they generally used their own equipment such as a mortar and pestle or a portable grinder, and paid for the use of the area by giving Russell some of their ore. A witness testified that they used "Russell's Camp" because water was available and they needed a safe place to store their equipment. Apparently no mineralized material has been processed on the claim in the past three years.
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> The mining engineer with the National Park Service testified that he had visited the mill site more than a dozen times between 1973 and the time of the hearing. Over the six-year period he did not observe anything that would indicate the property was being used for any mining or milling purposes. He found nothing on the property that was "in operating condition or anywhere near operating condition that could be used for processing, milling or crushing" except a sledgehammer. (Tr. 82).

Appellant failed to establish by a preponderance of the evidence that the millsite claim was used for mining and milling purposes. There was no quartz mill or reduction works on the property (Tr. 170). There was a homemade ball mill made from a 55-gallon drum, but it had last been operable about 3 years prior to the hearing (Tr. 170-71). Appellant testified that several hundred pounds of material had been processed in the ball mill tumbling device; however, the material was not sold and remained on the millsite (Tr. 178). Appellant stated that material from other claims was milled at the site and that he was paid in goods and services for use of the mill (Tr. 172, 178-79). Neither he nor his father had any business records (Tr. 181). He stated that he had some people interested in the millsite because of the water located there (Tr. 157).

[6] Appellant indicates on appeal that the Ten Spot millsite is a dependent millsite operated in connection with the Lucky Strike lode

claim. For that reason, because the lode claim is invalid, it necessarily follows that the millsite claim is invalid. United States v. Harder, 42 IBLA 206, 209 (1979); United States v. Tempest Mining Co., 40 IBLA 297, 306 (1979); United States v. Parsons, 33 IBLA 326, 334 (1978).

Appellant's vague assertion that the millsite is also used in connection with other mining claims does not change the result because appellant failed to establish that the millsite was being used or occupied for mining or milling purposes in connection with any such claims.

Appellant cannot possibly contend that the millsite was being claimed as an independent millsite, because he specifically stated that no quartz mill or reduction works existed on the claim (Tr. 170).

[7] Appellant has also requested a new hearing; however, a second hearing will not be afforded where a claimant has been given notice and an opportunity to appear at a hearing, and where he actually was represented at the hearing and where nothing has been submitted to indicate that another hearing would produce a different result. United States v. Synbad, 42 IBLA 313, 322 (1979); United States v. Weigel, 26 IBLA 183, 187 (1976).

The Lucky Strike lode mining claim and the Ten Spot millsite claim were properly declared invalid.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Bruce R. Harris
Administrative Judge

We concur:

Douglas E. Henriques
Administrative Judge

James L. Burski
Administrative Judge